



November 29, 2021

Andria Strano
Acting Chief, Division of Humanitarian Affairs
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
5900 Capital Gateway Drive
Camp Springs, MD 20746

VIA ELECTRONIC FILING

Re: Deferred Action for Childhood Arrivals

Dear Ms. Strano,

The Center for Immigration Studies (CIS) submits the following public comment to the U.S. Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) in response to the department's request for comments on the Notice of Proposed Rulemaking (NPRM) titled *Deferred Action for Childhood Arrivals*, as published in the Federal Register on September 28, 2021.¹

CIS is an independent, non-partisan, non-profit, research organization. Founded in 1985, CIS has pursued a single mission – providing immigration policymakers, the academic community, news media, and concerned citizens with reliable information about the social, economic, environmental, security, and fiscal consequences of legal and illegal immigration into the United States. CIS is the nation's only think tank devoted exclusively to the research of U.S. immigration policy informing policymakers and the public about immigration's far-reaching impact.

I. INTRODUCTION

In 2001, Senators Dick Durbin (D-Ill.) and Orin Hatch (R-Utah) introduced S. 1291, the Dream, Relief, and Education for Alien Minors Act, that would have provided amnesty and a path to citizenship for certain illegal aliens² who claimed to have entered the country as a minor and

¹ Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53736 (Sept. 28, 2021), available at <https://www.federalregister.gov/documents/2021/09/28/2021-20898/deferred-action-for-childhood-arrivals>.

² In footnote 32 of the proposed rule, DHS writes, "For purposes of this discussion, USCIS used the term 'noncitizen' to be synonymous with the term 'alien' as it is used in the INA." 86 Fed. Reg. 53740. According to the Merriam-Webster dictionary, the term "synonymous" is defined as "having the character of a synonym" or "having the same connotations, implications, or reference". See <https://www.merriam-webster.com/dictionary/synonymous>. Merriam-Webster further defines "synonym" as "a word that has the same meaning as another word in the same language" or "a word, a name, or phrase that very strongly suggests a particular idea, quality, etc." See <https://www.merriam-webster.com/dictionary/synonym>. Section 101(a)(3) of the Immigration and Nationality Act (INA) defines the term "alien" as "any person not a citizen or national of the United States." available at: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-101.html>; see also Section 101(a)(22) of the INA (2021) ("The term 'national of the United States' means: (A) a citizen of the United States, or



met other criteria.³ Commonly referred to as the “DREAM Act”, the illegal aliens who were poised to benefit from the amnesty dubbed themselves as “Dreamers”. Despite the branding effort, the 107th Congress refused to pass the amnesty as did subsequent Congresses throughout George W. Bush’s two terms as president covering January 20, 2001 to January 20, 2009.⁴

The amnesty lobby thought it had in ally in President Bush’s successor Barack Obama who entered the White House with high approval ratings and Democratic control of both chambers of Congress, including a filibuster proof majority in the United States Senate. To their disappointment, “immigration reform” was largely ignored at the beginning of the Obama administration so amnesty activists began voicing their outrage by the fall of 2010 that the president bypass Congress. President Obama initially balked, saying in October 2010 in response to demands that he unilaterally implement immigration changes, “I am not king. I can’t do these things just by myself.”⁵

(B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.”), available at: <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-101.html>; *Miller v. Albright*, 523 US 420, 467 n. 2 (1998) (Ginsberg, J., dissenting) (“Nationality and citizenship are not entirely synonymous; one can be a national of the United States and yet not a citizen.”), available at: [https://scholar.google.com/scholar_case?case=16706312627647904855&hl=en&as_sdt=6&as_vis=1&oi=scholar#\[31\]](https://scholar.google.com/scholar_case?case=16706312627647904855&hl=en&as_sdt=6&as_vis=1&oi=scholar#[31]). Clearly, the legal term of art “alien” and the word “noncitizen” are not “synonymous” and DHS’s decision, at the direction of the Biden administration political appointees, to falsely equate the two deprives the public of specificity when discussing U.S. immigration law. In fact, DHS acknowledges these words are not synonymous in the very memorandum that orders personnel to cease using the legal term “alien”, with notable exceptions. See Robert Law, *Immigration Newspeak II – USCIS Edition*, CENTER FOR IMMIGRATION STUDIES (Feb. 16, 2021) (Alas, this illogical scrubbing of technical language has reached my former agency. As first reported by Axios (and confirmed by my sources), USCIS staff received a memo February 16 — dated February 12 — with the subject “Terminology Changes”.... Un-ironically, the memo contradicts itself by saying the guidance “does not affect legal, policy or other operational documents, including forms, where using terms (i.e., applicant, petitioner, etc.) as defined by the INA would be the most appropriate.” In the table replacing “alien” with “noncitizen” there is an associated footnote that reads, “Use noncitizen except when citing statute or regulation, or in a Form I-862, Notice to Appear, or Form I-863, Notice of Referral to Immigration Judge.” Translation: This cringe-worthy effort is a messaging gimmick.), available at: <https://cis.org/Law/Immigration-Newspeak-II-USCIS-Edition> ; Andrew Arthur, *Defining Immigrants, Noncitizens, Aliens, Nonimmigrants, and Nationals*, *Who’s Who in Immigration Law?*, CENTER FOR IMMIGRATION STUDIES (Jun. 26, 2017) (“So, citizens are nationals of the United States, but not all nationals are citizens. Therefore, the term “noncitizen” includes aliens and nationals who are not citizens. But, nationals are not subject to removal proceedings under section 240 of the INA, only aliens are; therefore, any case that discusses whether or an individual is to be removed, unless it is a case involving contested citizenship, relates to an ‘an alien’ not a ‘noncitizen’.”), available at: <https://cis.org/Arthur/Defining-Immigrants-Noncitizens-Aliens-Nonimmigrants-and-Nationals>. The Department’s inherent tension with the non-synonymous relationship between the terms “alien” and “noncitizen” is further exposed throughout the NPRM where DHS sporadically uses an array of terms, including “individual”, in place of alien.

³ Dream, Relief, and Education for Alien Minors Act, S. 1291, 107th Cong. (2001-2002), available at: <https://www.congress.gov/bill/107th-congress/senate-bill/1291>.

⁴ See <https://www.americanimmigrationcouncil.org/research/dream-act-overview>. Versions of the DREAM Act have varied over time, usually getting more expansive in the illegal alien population that would benefit from the amnesty, but no version of the bill has ever been delivered to the President’s desk to sign into law.

⁵ See <https://latimesblogs.latimes.com/washington/2010/10/transcript-of-president-barack-obama-with-univision.html>.



That was no one-off statement either. In March 2011, President Obama said that with "respect to the notion that I can just suspend deportations through executive order, that's just not the case."⁶ Again, in May 2011, Obama insisted that he cannot "just bypass Congress and change the [immigration] law myself.... That's not how a democracy works."⁷

Yet, ahead of his 2012 re-election bid President Obama changed course to sure up political support. In a three-page memorandum issued on June 15, 2012 by then-DHS Secretary Janet Napolitano entitled, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, the Obama administration created an executive amnesty program that largely mirrored the DREAM Act.⁸ Known as Deferred Action for Childhood Arrivals (DACA), under the guise of "prosecutorial discretion", illegal aliens could receive a deferral from removal *and* an employment authorization document (EAD, or work permit) if they met the following criteria: (1) claim they entered the United States under the age of 16; (2) continuously resided in the United States for at least 5 years preceding June 15, 2012, and were present in the United States on that date; (3) are in school, have graduated from high school, have obtained a General Education Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; (4) have not been convicted of a felony offense, a "significant misdemeanor offense", or otherwise do not pose a threat to national security or public safety; and (5) were not above the age of 30 on June 15, 2012.⁹

The DACA policy has an extensive litigation history that is discussed in Section II of this comment. This NPRM generally attempts to establish DACA through the Administrative Procedure Act's (APA) notice and comment rulemaking. As this comment will show in great detail, DACA is an unlawful Executive Branch usurpation of Congress that cannot be cured through notice and comment rulemaking. Additionally, this NPRM appears to violate a federal district court injunction, possibly exposing DHS to sanctions. As a result of the inherent *ultra vires* nature of the NPRM, the Center declines to provide comment on specific provisions in the proposed rule, including those that differ from the original DACA policy.

II. DACA LITIGATION HISTORY PRE-BIDEN ADMINISTRATION

While many outside observers, including the Center, immediately objected to DACA as an unlawful Executive Branch action, no one with legal standing initially sued. Emboldened, the

⁶ See <https://obamawhitehouse.archives.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall>.

⁷ See <https://obamawhitehouse.archives.gov/the-press-office/2011/05/10/remarks-president-comprehensive-immigration-reform-el-paso-texas>; for additional examples of President Obama dismissing his executive authority to change U.S. immigration law, see <https://www.nytimes.com/roomfordebate/2014/11/18/constitutional-limits-of-presidential-action-on-immigration-12/obamas-own-words-refute-his-stand-on-immigration-authority>.

⁸ Memorandum from Janet Napolitano, Secretary, DHS (June 15, 2012), available at <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

⁹ Memorandum from Janet Napolitano, Secretary, DHS (June 15, 2012), available at <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.



CENTER FOR IMMIGRATION STUDIES

Obama administration issued a new policy in 2014 that expanded DACA (DACA+) and also created a new executive amnesty program for the illegal alien parents of U.S. citizen and lawful permanent resident children, known as Deferred Action for Parents of Americans (DAPA).¹⁰ This time, the state of Texas, joined by 25 other states, sued the Obama administration in the federal southern district of Texas court. In February 2015, Judge Andrew Hanen enjoined DAPA and DACA+, ruling that these policies violated the APA.¹¹ The federal Fifth Circuit Court of Appeals affirmed Judge Hanen's ruling in November 2015,¹² as did an evenly divided U.S. Supreme Court in 2016.¹³

Subsequently, Judge Hanen drew the assignment for the legal challenge to DACA. On August 31, 2018, more than six years after DACA was implemented, Judge Hanen issued an order finding that that DACA likely violates the APA, but given the plaintiffs' "unreasonable delay in seeking relief", he declined to issue a preliminary injunction.¹⁴ While this legal battle played out, which the Center identifies as Texas II for purposes of clarity, Donald Trump was elected president and vowed to terminate DACA. On September 4, 2017, then-Attorney General Jeff Sessions sent then-Acting DHS Secretary Elaine Duke a letter advising her to rescind DACA, explaining that DACA was "an unconstitutional exercise of authority by the Executive Branch".¹⁵ The next day, Duke issued a memorandum of her own rescinding DACA but delayed the effective date until March 5, 2018, allowing illegal alien DACA recipients whose benefits would have expired before that date to apply for renewal for another month, until October 5, 2017.¹⁶

That termination was challenged by illegal alien advocates. On June 22, 2018, in response to direction from the U.S. District Court for the District of Columbia,¹⁷ then-DHS Secretary Kirstjen Nielsen issued a separate memorandum concurring with and declining to disturb Duke's decision. Nielsen's memorandum contained additional policy-based justifications for the rescission of DACA.¹⁸ Eventually this case wound up at the Supreme Court. On June 18, 2020, the Court held that DHS's September 2017 decision to wind down DACA (the Duke memo) was reviewable under the APA, and that the decision violated the APA as arbitrary and capricious.¹⁹

On June 30, 2020, then-Attorney General William Barr sent a letter to then-Acting DHS Secretary Chad Wolf withdrawing both Sessions' September 4, 2017 letter to Duke as well as a November 19, 2014 opinion from DOJ's Office of Legal Counsel (OLC) on the legality of DACA, to allow DHS to consider the issue of whether DACA should be rescinded "anew", in

¹⁰ See https://www.uscis.gov/sites/default/files/document/flyers/EAFlier_DAPA.pdf.

¹¹ *Texas v. U.S.*, No 1:14-cv-00254 (S.D. Tex. Feb. 16, 2015) (*Texas I*).

¹² *Texas v. U.S.*, 809 F.3d 134 (5th Cir. 2015).

¹³ *U.S. v. Texas*, 579 U.S. ____ (2016).

¹⁴ *Texas v. U.S.*, No. 1:18-cv-00068 (S.D. Tex. Aug. 31, 2018) (*Texas II*).

¹⁵ Memorandum from Attorney General Jeff Sessions to Acting Secretary of Homeland Security Elaine Duke, Sept. 4, 2017, available at https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf.

¹⁶ Memorandum from Acting Secretary Elaine Duke, available at <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

¹⁷ *NAACP v. Trump*, 298 F.Supp.3d 209 (2018).

¹⁸ Memorandum from Secretary Kirstjen Nielsen, available at https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf; see also Andrew Arthur, *Biden Continues DACA Program*, CENTER FOR IMMIGRATION STUDIES (Jan. 22, 2021) available at <https://cis.org/Arthur/Biden-Continues-DACA-Program> (concise procedural history of the Trump administration's attempt to terminate DACA).

¹⁹ *DHS v. Regents*, 591 U.S. ____ (2020).



accordance with the Supreme Court's opinion.²⁰ On July 28, Wolf issued a memorandum rescinding Duke's and Nielsen's memoranda, and directing DHS personnel to reject pending initial DACA applications and applications for employment authorization filed in conjunction with those applications, as well as pending and future applications for advance parole "absent exceptional circumstances".²¹

On November 14, 2020, a federal district court judge in New York issued an order invalidating Wolf's DACA restrictions on the ground that Wolf lacked the authority to serve as acting DHS secretary, and could thus not restrict DACA. The judge ordered DHS to accept first-time DACA requests, including employment authorization, as well as advance parole requests.²² On January 20, 2021 Joe Biden was sworn in as president and issued a memorandum to the Attorney General and DHS secretary "preserving and fortifying" DACA.²³

III. FEDERAL DISTRICT COURT RULES DACA ILLEGAL

On July 16, 2021, Judge Hanen, the same judge who struck down DACA+/DAPA in *Texas I*, ruled on the merits that DACA is illegal, in *Texas II*.²⁴ Prior to ruling on the merits, Judge Hanen first had to determine whether or not the state of Texas has legal standing to bring the lawsuit. Under Supreme Court precedent, a state can establish standing in federal court through a legal concept known as "special solicitude" if the defendant "violated a congressionally accorded procedural right which affected the State's 'quasi-sovereign' interests."²⁵ The Fifth Circuit had previously found Texas entitled to "special solicitude" in *Texas I*.

A. *The State of Texas has standing to sue*

Consistent with *Texas I*, Judge Hanen found that Texas easily established the first requirement of "special solicitude" by having a procedural right to challenge DHS's "affirmative decision to set guidelines to grant lawful presence to a broad class of illegal aliens."²⁶ Judge Hanen wrote that Texas has a right under the APA to demand that DHS enforce immigration laws "in the manner dictated by Congress".²⁷ He continued, "If the Government's argument that a state lacks standing to complain about the Executive Branch's failure to enforce the law in court is accurate, then a state would have no recourse. This is not how our system of federalism was designed to work."²⁸

²⁰ Memorandum from Attorney General William Barr, *available at*

https://www.dhs.gov/sites/default/files/publications/20_0630_doj_aj-barr-letter-as-wolf-daca.pdf.

²¹ Memorandum from Acting Secretary Chad Wolf, *available at*

https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf.

²² *Batalla Vida v. Wolf*, *available at* https://www.dhs.gov/sites/default/files/publications/20_1114_ogc_batalla-vidal-partial-msj-class-cert-order_508.pdf.

²³ Presidential Memorandum, PRESERVING AND FORTIFYING DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA), Jan. 20, 2021, *available at* <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/preserving-and-fortifying-deferred-action-for-childhood-arrivals-daca/>.

²⁴ *U.S. v. Texas*, No. 1:18-cv-00068, 2021 WL 3025857 (S.D. Tex. July 16, 2021) (*Texas II*).

²⁵ *See id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*



Moving to the second prong of the analysis, in *Texas I* the Fifth Circuit found that DAPA affected a “quasi-sovereign” interest by forcing Texas to provide driver’s licenses to these illegal aliens, which are partially subsidized by taxpayers. Instead of making the driver’s license cost argument again, in the DACA case Texas argued it has a “quasi-sovereign” interest in protecting the economic and commercial interests of its legal residents’ (U.S. citizens and legal immigrants) from “labor market distortion” caused by DACA.²⁹ Judge Hanen agreed, citing a government expert witness who conceded that “DACA congests the workforce.”³⁰ Applying the simple logic of supply and demand, which advocates of unlimited immigration disregard, Judge Hanen found that “the very existence of a larger eligible workforce ... necessarily contributes to a more competitive labor market, which makes it more difficult for the legal residents of Texas to obtain work.”³¹

In addition to labor market harms, Judge Hanen also found that DACA recipients are fiscal drains on healthcare, education, and social services offered by the state.³² Again citing the Biden administration’s own expert witnesses, Judge Hanen highlighted that DACA recipients impose a cost of \$250 million on Texas per year and an additional \$533 million annually in costs to local Texas communities.³³

B. Judge Hanen rules that DACA violates the Administrative Procedure Act

After finding that Texas had established standing to sue due to the fiscal harm caused by illegal aliens to American workers and taxpayers, Judge Hanen then examined whether DHS was required by the APA to implement DACA through notice and comment rulemaking. Unpersuaded by the government’s claim that DACA is a mere statement of policy on prosecutorial discretion, Hanen pointed out that the DACA memo contains mandatory language that contradicts its purported conferral of discretion.³⁴ Specifically, Hanen found that the DACA memo has prescribed criteria with no ability for an adjudicator to deviate from it.³⁵ Additionally, the government in *Texas I* and this case were unable to identify a single example of an illegal alien meeting the DACA criteria but receiving a discretionary denial.³⁶ Hanen even cited the June 15, 2012, DHS press release that announced DACA was “effective immediately” indicating it is a final agency action that had immediate impact.³⁷

C. Judge Hanen rules that DACA violates immigration law

Having found that the DACA memo violated the APA’s notice and comment requirement, Hanen then examined whether DACA violates substantive immigration law. In ruling DACA illegal, Judge Hanen wrote, “The decision to award deferred action, with all of the associated benefits of DACA status, is outside the purview of prosecutorial discretion.”³⁸ He continued, “While the law certainly grants some discretionary authority to the agency, it does not extend to

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*



include the power to institute a program that gives deferred action and lawful presence, and in turn, work authorization and multiple other benefits to 1.5 million individuals who are in the country illegally.”³⁹

Returning to the economic harm analysis, Judge Hanen further opined that “DACA actually goes further to undermine Congress’s intent to protect American workers as it *requires* applicants to apply for work authorization,” which “contradicts the clear congressional purpose of preserving employment opportunities for those persons legally residing in the U.S.”⁴⁰ (Emphasis Hanen’s.) Hanen concluded: “DACA is an unreasonable interpretation of the law because it usurps the power of Congress to dictate a national scheme of immigration laws and is contrary to the INA.”⁴¹

Yet, despite this stern legal rebuke of DACA, Judge Hanen declined to immediately rescind the work permits of the active DACA recipients. Instead, he cut off consideration of new requests and effectively maintained the status quo for active DACA recipients pending a future decision on that issue from either Judge Hanen, the Fifth Circuit, or the Supreme Court.⁴² Additionally, Judge Hanen remanded the DACA memo to DHS to explore whether they wish to modify the policy to only include temporary deportation “forbearance”.⁴³

IV. THIS NPRM VIOLATES JUDGE HANEN’S RULING

DHS, through this NPRM, is violating Judge Hanen’s ruling in *Texas II* and impermissibly substituting its own opinion above a legally binding court order. This blatant disregard of Judge Hanen’s ruling exposes DHS to being held in contempt of court and sets a dangerous precedent to our checks-and-balances system of government. Pursuing this rulemaking while litigation continues also reflects a gross mismanagement of resources, at DHS and USCIS.

In the beginning of the preamble, DHS misstates Judge Hanen’s ruling in an apparent attempt to justify the NPRM as a legitimate APA rulemaking endeavor. Specifically, DHS summarizes the *Texas II* holding in part, “The district court’s vacatur and injunction were based, in part on its conclusion that the June 2012 memorandum announced a legislative rule that required notice-and-comment rulemaking.”⁴⁴ As explained above in Section III, the obvious finding that the DACA memo violated the APA was *only part* of the court’s decision.

But Judge Hanen did not stop there, much to the chagrin of the DHS political leadership. In ruling DACA illegal, Judge Hanen wrote, “The decision to award deferred action, with all of the associated benefits of DACA status, is outside the purview of prosecutorial discretion.”⁴⁵ Hanen continued, “While the law certainly grants some discretionary authority to the agency, it does not

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53736 (Sept. 28, 2021), available at <https://www.federalregister.gov/documents/2021/09/28/2021-20898/deferred-action-for-childhood-arrivals>.

⁴⁵ *U.S. v. Texas*, No. 1:18-cv-00068, 2021 WL 3025857 (S.D. Tex. July 16, 2021) (*Texas II*).



extend to include the power to institute a program that gives deferred action and lawful presence, and in turn, work authorization and multiple other benefits to” over 600,000 illegal aliens.⁴⁶ Judge Hanen concluded that “DACA is an unreasonable interpretation of the law because it usurps the power of Congress to dictate a national scheme of immigration laws and is contrary to the INA.”⁴⁷ Simply put, Judge Hanen determined that DHS could not cure the underlying legal fallacy of DACA even if it utilized notice and comment rulemaking.

Despite being bound by the court’s ruling, DHS has reached the incredible, and unlawful, conclusion that it can continue with rulemaking because it disagrees with the court. Buried in footnote 178 of the preamble, DHS finally acknowledges the full extent of Hanen’s ruling, writing “The district court in Texas II also concluded that ‘DACA is an unreasonable interpretation of the law because it usurps the power of Congress to dictate a national scheme of immigration laws and is contrary to the INA.’”⁴⁸ Brazenly, DHS follows that up by declaring, “The Department respectfully disagrees...” and goes on to reiterate the same view of DACA that Judge Hanen rejected in court.⁴⁹ In a separate footnote earlier in the preamble, DHS again “respectfully disagrees with the court’s interpretation” of “prosecutorial discretion” being distinguishable from “adjudicative discretion.”⁵⁰

It is immaterial whether or not DHS “agrees” with a federal court’s ruling, it is nonetheless bound by its holding unless an appellate court overturns the verdict. DHS has appealed Judge Hanen’s decision and it is currently pending with the Fifth Circuit Court of Appeals. While litigation can drag on and that can be frustrating for an administration’s attempt at policy-making, that is how our legal system works. DHS is not above the law and it is rather remarkable the layers of review this NPRM passed in order to be published three weeks after Judge Hanen struck down DACA. Unless the Fifth Circuit or the Supreme Court overturns *Texas II*, DHS is estopped from implementing it by regulation or any other Executive Branch action.

V. USCIS OFFICERS LACK AUTHORITY TO ADMINISTER DACA

Even if DHS could pursue rulemaking while simultaneously appealing Judge Hanen’s ruling, USCIS lacks the authority to administer DACA. This makes DACA inherently *ultra vires*.

A. DHS’s Authorizing Legislation Limits the Authority of USCIS Officers

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53736 (Sept. 28, 2021), available at <https://www.federalregister.gov/documents/2021/09/28/2021-20898/deferred-action-for-childhood-arrivals>.

⁴⁹ *Id.*

⁵⁰ *Id.*



CENTER FOR IMMIGRATION STUDIES

As the 9/11 Commission determined, the September 11, 2001 terrorist attacks reflected significant failures by our national security and immigration agencies.⁵¹ In response to those attacks, Congress created DHS through the Homeland Security Act of 2002 (HSA).⁵²

In the process of implementing the HSA, the immigration jurisdiction that had been held by the former Immigration and Naturalization Service (INS) within DOJ was transferred to three components within DHS, known today as U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS).

Section 451(b) of the HSA enumerated five functions that were transferred from the then-INS commissioner to the “Director of the Bureau of Citizenship and Immigration Services”: (1) adjudications of immigrant visa petitions; (2) adjudications of naturalization petitions; (3) adjudications of asylum and refugee applications; (4) adjudications performed at service centers; and (5) all other adjudications performed by the INS immediately before those authorities were transferred from DOJ to DHS.⁵³

The precise wording of the delegation in the HSA irrefutably demonstrates that Congress intentionally gave USCIS only authority to adjudicate immigration benefit requests, not take (or decline to take) enforcement actions against aliens.⁵⁴ By contrast, Congress intentionally gave CBP and ICE the authority to enforce our immigration laws at the border and interior of the country, respectfully. Prosecutorial discretion is inherently an enforcement decision that is only available to agencies tasked with enforcement duties. Any attempt to reassign those functions

⁵¹ See *The 9/11 Commission Report*, NAT’L COMM. ON TERRORIST ATTACKS UPON THE UNITED STATES (Aug. 20, 1994), at 186 (“The third point on which the principals had agreed on March 10 was the need for attention to America’s porous borders and the weak enforcement of immigration laws.”); *id.* at 81-83 (discussing the role of the former Immigration and Naturalization Service in national security), available at: <https://www.9-11commission.gov/report/911Report.pdf>; H. REP. NO. 107-609, at 66 (2002) (“Terrorists seeking to bring destructive technologies into the United States have many potential entry points. The United States is a large nation, historically protected from adversaries by two large bodies of water and friendly neighbors to the north and south. It is a nation with relatively open borders that are open to trade and the free flow of people and ideas. Such openness also brings about vulnerabilities. Every day \$8.8 billion of goods, 1.3 million people, 58,000 shipments, and 340,000 vehicles enter the United States. The Customs Service is only able to inspect 1 to 2 percent of them. . . . Once here, they have an excellent chance of remaining anonymous and using the freedom America affords to plan and execute their violent deeds. The Immigration and Naturalization Service (INS) was unable to track more than 3 million foreigners with expired visas and, according to press reports, had no record of six of the 19 hijackers who entered the United States legally (Washington Post, Page A16, October 7, 2001). A report by the Government Accounting Office (GAO) offered, “In several border areas, INS has multiple anti-smuggling enforcement units--they overlap in jurisdictions, operate autonomously, establish their own priorities and report to different INS offices,” (GAO Report, “Alien smuggling: Management and Operational Improvements Needed to Address Growing Problem” (GAO/GGD-00-103 p.3)).”), available at: <https://www.congress.gov/107/crpt/hrpt609/CRPT-107hrpt609.pdf>.

⁵² Homeland Security Act of 2002, Pub. L. 107-296 (Nov. 25, 2002), available at: <https://www.congress.gov/107/plaws/publ296/PLAW-107publ296.pdf>.

⁵³ *Id.* at section 451, 116 Stat. 2195-2197.

⁵⁴ *Overview of INS History*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (undated), at 11 (“The Homeland Security Act of 2002 disbanded INS on March 1, 2003.”; note, however, that section 471 of the HSA, 116 Stat. 2205, made clear that the INS was “abolished”, not “disbanded”), available at: <https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf>.



CENTER FOR IMMIGRATION STUDIES

administratively—as the NPRM attempts to do—is therefore *ultra vires*, and adoption of this proposal would expose DHS to significant litigation risk.⁵⁵

B. USCIS is not an enforcement agency and therefore lacks the ability to grant deferred action to any alien

According to DHS in the preamble, “[d]eferred action is a longstanding practice by which DHS and the former Immigration and Naturalization Service (INS) have exercised their discretion to forbear or assign lower priority to removal action in certain cases for humanitarian reasons, administrative convenience, or other reasonable prosecutorial discretion considerations.”⁵⁶ Accepting this proffered definition of “deferred action” for the sake of argument, DHS glosses over the distinct authorities Congress delegated to each of the three immigration components within DHS when INS was abolished through the HSA.

The USCIS mission statement makes clear that the agency has no enforcement authority. The current mission statement, which was unveiled in 2018, reads, “U.S. Citizenship and Immigration Services administers the nation’s lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values.”⁵⁷

The prior mission statement is similarly unhelpful for DHS for legitimizing DACA within USCIS. The previous mission statement read, “USCIS secures America’s promise as a nation of immigrants by providing accurate and useful information to our customers, granting immigration and citizenship benefits, promoting an awareness and understanding of citizenship, and ensuring the integrity of our immigration system.”⁵⁸

DACA, as described in the Napolitano Memo and this NPRM, fails to meet DHS’s definition of “deferred action”. As Judge Hanen found, “The decision to award deferred action, with all of the associated benefits of DACA status, is outside the purview of prosecutorial discretion.”⁵⁹ The primary “associated benefit” that DACA affords is an EAD, allowing an illegal alien permission to work lawfully in the country despite lacking a lawful immigration status. It is clear that the

⁵⁵ See 5 U.S. Code § 706(2)(A) (2021) (“Scope of review” for the Administrative Procedure Act; “To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall— (2) hold unlawful and set aside agency action, findings, and conclusions found to be— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”), available at: <https://www.law.cornell.edu/uscode/text/5/706>; *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971) (“The court is first required to decide whether the Secretary acted within the scope of his authority.”), available at: <https://supreme.justia.com/cases/federal/us/401/402/>.

⁵⁶ Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53736 (Sept. 28, 2021), available at <https://www.federalregister.gov/documents/2021/09/28/2021-20898/deferred-action-for-childhood-arrivals>. (citing *Reno v. Am-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999)).

⁵⁷ <https://www.uscis.gov/about-us/mission-and-core-values>.

⁵⁸ See <https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says>.

⁵⁹ Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53736 (Sept. 28, 2021), available at <https://www.federalregister.gov/documents/2021/09/28/2021-20898/deferred-action-for-childhood-arrivals>.



Obama administration housed DACA within USCIS because it is essentially an illegal alien work permit program.

With this in mind, Judge Hanen remanded the DACA memo to DHS to explore whether they wish to modify the policy to only include temporary deportation “forbearance”.⁶⁰ This was intended to be an opportunity for DHS to establish a true “forbearance” policy within one of the enforcement components, most likely ICE. Instead, DHS has ignored a federal district court decision and attempted to “comply” with this aspect of Judge Hanen’s order by disassociating the cost of “deferred action” from the EAD. This tactic is not a good faith effort to adhere to the court’s ruling and continues the inappropriate practice of giving USCIS adjudicators enforcement decision-making authority they do not have under the law.

VI. FAILURE TO CONDUCT AN ENVIRONMENTAL IMPACT STATEMENT, OR, AT THE VERY LEAST, AN ENVIRONMENTAL ASSESSMENT BEFORE FINALIZING DACA VIOLATES THE NATIONAL ENVIRONMENTAL POLICY ACT.

Separate from the *ultra vires* nature of this proposed rule, DHS makes several unsustainable and inconsistent claims in the NPRM to disavow its legal obligation to conduct environmental analysis under NEPA. DHS claims that even if the Deferred Action for Childhood Arrivals (DACA) program “might have effects on the environment,... DHS believes analysis of such effects would require predicting a myriad of independent decisions by a range of actors... at indeterminate times in the future. Such predictions are unduly speculative and not amenable to NEPA analysis.”

In other words, DHS is asserting that it is not obligated to understand the environmental impacts of a program that would ultimately grant approximately 800,000 illegal aliens the right to stay and work in the U.S. (a population greater than Washington D.C.), because that analysis might require consideration of a number of factors. Yet population growth is the first named concern in the statute itself,⁶¹ and therefore clearly a program that consists of providing a pathway to stay and work in the U.S. to a such a large illegal alien population requires, at the very least, consideration of its potential environmental footprint.

Contrary to DHS’s assertion, rather than not being “amenable to NEPA analysis,” it is the very essence of NEPA analysis. NEPA would not be necessary at all if awareness of the environmental effects of agency decisions required no analysis to achieve. Every day, agencies hire environmental scientists for projects like proposed power plants or water supply facilities in order to call upon their expertise in wide scale *trends* in energy or water consumption and to make projections buttressed by informed assumptions, of what future needs will be based on those trends. Given that population size is a fundamental factor driving basically all the needs

⁶⁰ *Id.*

⁶¹ NEPA begins by stating that the passages of the law was made necessary because Congress “*recognize[ed] the profound impact of man’s activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth...*” 42 USC § 4331(a)(2021), available at: <https://www.law.cornell.edu/uscode/text/42/4331>



NEPA analysts are called to project, there is a wealth of knowledge and expertise for DHS to drawn upon. For example, DHS could project the level of infrastructure, energy, and water consumption that constitutes the environmental impact of 800,000 extra people in the population. This analysis is exactly the kind of “relevant information” NEPA aims to make “available to a larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.”⁶²

NEPA does not provide agencies with an escape hatch from compliance with the entire NEPA process by merely claiming the environmental effects of a program are “speculative.” As the D.C. Circuit Court explained in an early case applying NEPA, the basic function of NEPA is to force federal agencies to consider the potential effects of their actions, and consideration of future impacts necessitates some degree of speculation about the future:

The agency need not foresee the unforeseeable, but by the same token neither can it avoid drafting an impact statement simply because describing the environmental effects of and alternatives to particular agency action involves some degree of forecasting. And one of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown. It must be remembered that the basic thrust of an agency’s responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as “crystal ball inquiry.” “The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible.” But implicit in this rule of reason is the overriding statutory duty of compliance with impact statement procedures to “the fullest extent possible.”⁶³

DHS is not the first agency to insist that NEPA does not apply to its actions. In an interview conducted in 1980, when NEPA had been law for ten years, William Hedeman, a one-time Director of the Environmental Protection Agency’s Office of Environmental Review, explained: “[i]f you analyze the ten-year history of NEPA you see several stages—an initial stage in which Federal agencies resisted its application by arguing that it was not applicable to most of their activities.”⁶⁴ But NEPA does not let an agency off the hook so easily: “An agency cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment.”⁶⁵

DHS is also demonstrably incorrect to assert that providing any sort of estimation of the environmental effects of population growth caused by DACA presents a particularly impenetrable problem requiring an excessive degree of speculation. Environmental scientists routinely calculate human impacts on the environment and the effects of trends in population

⁶² *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 349 (1989).

⁶³ *Scientists’ Inst. for Public Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d at 1093, citing *Natural Resources Defense Council v. Morton*, 458 F. 2d 827, 833 (D.C. Cir. 1972)

⁶⁴ “The National Environmental Policy Act: An Interview with William Hedeman, Jr,” EPA Journal, November/December 1980, at <https://archive.epa.gov/epa/aboutepa/national-environmental-policy-act-interview-william-hedeman-jr.html>

⁶⁵ *The Steamboaters v. F.E.R.C.*, 759 F.2d 1382, 1393 (9th Cir. 1985).



growth are a crucial, unavoidable part of any such calculation.⁶⁶ Calculating the environmental impacts of additional population does not require more guesswork than many NEPA analyses agencies have routinely produced for decades.

DHS, like all agencies applying NEPA analysis, would be allowed to make reasonably informed estimates on a macro level, and, just as in other contexts, the public would not be able to demand that all agency predictions prove to be absolutely accurate. All agencies had to engage in what could be termed “speculation” when they first had to implement NEPA. Performing a NEPA analysis of DACA—especially now, when DHS actually knows the size of the program, and where its beneficiaries have settled based on their applications, would not require excessive speculation, and it would certainly not be unreasonably difficult.⁶⁷

DHS ignores the well-established use of nationwide, programmatic NEPA reviews by federal agencies that would be comparable to a nationwide, programmatic analysis of DACA. An illustrative example of a wide reaching, expansive programmatic review is the “Programmatic Environmental Assessment for the Office of Coast Survey Hydrographic Survey Projects”⁶⁸ which applies to surveying by the agency within all coastal U.S. waters. This programmatic EA for the National Ocean Service (NOS) of the National Oceanic and Atmospheric Administration (NOAA) analyzes the environmental effects of all of NOS’s surveying and mapping activities (using echo sounders as well as other instruments) over a five-year period within the Economic Exclusion Zone (EEZ) of the entire United States. This EA clearly demonstrates how “speculation”, including speculation that includes projecting where impacts will actually occur within a very large geographic area. Estimating impacts of a particular wide scale federal program even when they are not known precisely, based on past information, is at the heart of much NEPA analysis.

The kind of forecasting necessary to complete the NOS’ programmatic EA is very analogous to a process that DHS could easily conduct on a program like DACA. Therefore, it is unpersuasive for DHS to claim that environmental analysis involving forecasting and quantifying human impacts over wide areas where the locations of those impacts cannot be determined and assessed with laser precision need not be done at all. This argument is contrary to the very purpose of programmatic environmental reviews. Indeed, such forecasting is the essence of NEPA. If agencies could avoid NEPA compliance by merely labeling the impacts of their actions “speculative”, then agencies could essentially nullify NEPA. Such agency posturing degrades NEPA into little more than an aspirational statute. But the courts have made clear since the seminal case of *Calvert Cliffs* that NEPA has real teeth and requires genuine action on the part of agencies.⁶⁹

⁶⁶ See, e.g., POPULATION ECOLOGY AND HUMAN POPULATIONS, <https://sites.google.com/a/bvsd.org/mr-little-ap-environmental-science/unit-5-human-populations>

⁶⁷ For instance, Progressives for Immigration Reform, a nonprofit organization based in Washington, D.C., commissioned its own Programmatic Environmental Impact Statement on Immigration. If a small nonprofit organization can conduct a PEIS on immigration, a federal agency can as well. The analysis can be found here: Environmental Impact Statement, Progressives for Immigration Reform, (Oct. 2015), <http://www.immigrationeis.org/ieis-docs/PFIR-Immigration-EIS-2015oct-Abstract-and-Executive-Summary.pdf>.

⁶⁸ Final Programmatic Environmental Assessment for the Office of Coast Survey Hydrographic Survey Projects (May 2013), at 1 Oceanic and Atmospheric Admin., <https://nauticalcharts.noaa.gov/about/docs/regulations-and-policies/2013-18-nepa-ocs-final-pea.pdf>.

⁶⁹ *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F. 2d 1109 (D.C. Cir. 1971).



CENTER FOR IMMIGRATION STUDIES

Calculating the potential environmental impacts of a program granting the right to stay in the United States of 800,000 illegal aliens is be far more feasible than DHS concedes precisely because population growth is such an important driver of environmental impacts. Because environmental scientists have been so concerned about population growth for such a long time, it has been extensively studied in the decades since NEPA was adopted and is comparatively well understood. Therefore, the models used by environmental scientists regarding population growth and its known environmental impacts have become so sophisticated that developing an analysis that would provide the government genuinely beneficial information about the impacts of DACA based on local and national population growth would be a far less onerous undertaking than DHS acknowledges in an effort to avoid obligations required under NEPA. The effects of immigration programs like DACA are, quite simply, hardly the mysterious unknowable unknown that DHS purports it to be. Past failure by DHS to comply with NEPA is not legitimate grounds to continue ignoring it. The very purpose of NEPA is to make decision-making on the part of agencies more environmentally enlightened.

DHS arrived at this conclusion without ever engaging in any scoping, analysis, or data collection on the subject whatsoever. Without scoping, DHS has no basis for making any conclusion about the lack of feasibility of estimating the environmental impacts of DACA, as well as its cumulative impacts combined with other immigration programs. As articulated by the Supreme Court in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”⁷⁰ DHS never grounded these assertions that the effects of DACA are far too speculative to understand through the analysis of any sort of data at all, particularly when it has plenty of relevant data on DACA.

Furthermore, DHS’s claim that categorical exclusion A3(c) applies to DACA because “the proposed rule codifies the existing DACA policy and is not expected to alter the population who qualify for DACA” cannot be applied because no NEPA analysis was done before that existing DACA policy was established—or at any time since. To use this particular categorical exclusion, DHS would have to establish that it had not previously violated NEPA by failing to conduct prior analysis. DHS has already granted deferred action and work permits to 800,000 illegal aliens, a clearly environmentally significant population. Furthermore, DHS is not, at this moment, merely codifying existing policy. Existing policy—rather than putting DACA through Notice and Comment and adopting it through the APA process, would mean dissolving the DACA program because of previous court orders. This action is therefore not merely codifying existing policy—rather, it is taking action to grant residence and work permits to hundreds of thousands of illegal aliens who would otherwise inevitably lose their existing permits. DHS therefore cannot claim categorical exclusion A3(c).

DHS must perform, at the very least, an Environmental Assessment before finalizing DACA, to determine if it needs to conduct an Environmental Impact Statement. If it does not do so, that failure will amount to a violation of NEPA.

⁷⁰ *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983).



VII. CONCLUSION

For the reasons set forth herein, DHS should not adopt the proposals in the instant NPRM, which are *ultra vires* and in contravention of congressional intent and directives. DHS is also actively pursuing this rulemaking in direct violation of the federal court ruling in *Texas II* which held that the APA could not cure DACA's legal fallacies. The only remedy for DACA afforded by the court in *Texas II* is for DHS to establish a true enforcement-forbearance policy. As USCIS is not an enforcement agency, it is inherently *ultra vires* for that agency to administer DACA. Finally, in addition to the legal flaws of this NPRM, DHS has yet again failed to adhere to the requirements under NEPA, further exposing the Department to litigation risk.

Sincerely,

Robert Law
Director of Regulatory Affairs and Policy

Julie Axelrod
Director of Litigation

Center for Immigration Studies